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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85310960
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Applied for Mark	FUCT
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of

ERIK BRUNETTI

Serial No. 85/310960

Appeal Filed: July 27, 2013

Trademark: FUCT

Trademark Examining Attorney:

Zachary R. Bello

Law Office 111

EX PARTE APPEAL

APPLICANT'S BRIEF

In the matter of the petition for review of the final refusal of:

Applicant's Mark: FUCT

Application No. 85/310960

Applicant's Goods: Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps; Children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments.

International Class: 25

TABLE OF CONTENTS

I. INTRODUCTION	1
II. PROCEDURAL HISTORY AND DESCRIPTION OF RECORD.....	2
III. ARGUMENT	4
A. Summary of Argument.....	4
B. FUCT Is Not “Fuck” or “Fucked.”	5
1. Only the Mark Applied for is Relevant.....	5
2. The Office Has No Relevant Evidence that FUCT is Vulgar.	5
a. The Urban Dictionary is Insufficient Proof.....	5
b. The Urban Dictionary is Inadmissible Hearsay	7
c. Photographs of Applicant’s Products Show That Use is Not Vulgar	8
3. There is No Evidence that a Material Portion of the Public Understands the Mark to be Vulgar	8
C. FUCT is a Coined Term and Has No Meaning Other than a Brand Name	8
1. FUCT is an Arbitrary, Coined Mark.....	8
2. FUCT is Understood By the Public to be a Brand Name, Not a Vulgar Word	9
D. The Office Used an Incorrect Standard in Refusing Registration; Vulgar is Not the Standard in Section 2(a).	10
E. When There Are Multiple Meanings, a Mark Must Be Approved for Publication.....	12
F. In the Case of Doubt, a Mark Must Be Approved for Publication	12
G. The First Amendment Prohibits the Office from Favoring Selected Speech.	13
1. Restrictions on Speech are Presumptively Invalid.....	13
2. There is No Compelling Government Interest that Justifies the Restrictions on Speech.	16

a. The Mark is Not Obscene.....	16
b. The Argument That the Government is Merely Deciding How to Spend Money No Longer Has Validity.....	16
c. The Argument that the Government is Not Preventing Speech is Wrong	16
3. Second 2(a)'s Standard is Too Vague to Survive Constitutional Scrutiny.	18
a. Section 2(a) As Interpreted and Applied by the Office Does Not Provide Reasonable Notice of What is Allowable.	18
b. Section 2(a) Has Been Applied in an Arbitrary Manner.....	19
4. Section 2(a) is an Unconstitutional Burden on Speech and Penalized Disfavored Speech.	19
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

American Communications Assoc. v. Douds

339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950).	14
<u>In re Boulevard Entertainment</u> 334 F.3d 1336, 1343 (Fed. Cir. 2003).....	16
<u>In re Friggin Barnyard</u> 1999 TTAB Lexis 108	12
<u>In re Hepperle</u> 175 U.S.P.Q. 512 (T.T.A.B. 1972	12
<u>In re Mavety Media Group Ltd.</u> , 33 F.3d 1367, 1374 (Fed. Cir. 1994).....	13
<u>In re McGinley</u> , 660 F.2d 481 (CCPA 1981	16
<u>In re Over Our Heads</u> 16 U.S.P.Q.2d 1653.....	12
<u>In re Riverbank Canning</u> 95 F.2d 327 at 327 (CCPA 1938	11
<u>In re The Boulevard Entertainment, Inc.</u> , 334 F.3d 1136	5
<u>Kalman v. Cortes</u> , 723 F. Supp. 766 (E.D. Pa. 2010)	14
<u>In Re McGinley</u> 660 F.2d 481, 485 (CCPA 1981),	11
<u>Rosenberger v. Rectors and Visitors of the University of Virginia</u> 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)	14
<u>Snyder v. Phelps</u> 562 U.S. ___, 132 S.Ct. 1270, ___ L.Ed.2d ___ (2011).....	14
<u>Texas v. Johnson</u> 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)	14

STATUTES

Lanham Act, Section 2(a)	passim
Lanham Act, Section 42 (15 U.S.C. Section 1124).	17
Trademark Reporter, September-October 1993, 801.....	13;
Trademark Reporter, September-October 2011, 1476 at 1532	13

OTHER AUTHORITIES

- T. Davis, *Registration of Scandalous, Immoral, and Disparaging Matter Under Section 2(a) of the Lanham Act; Can One Man's Vulgarly Be Another's Registered Trademark*, Trademark Reporter, September-October 1993, 801 13
- L. LaLonde and J. Gilson, *Trademarks Laid Bare: Marks that May be Scandalous or Immoral*, Trademark Reporter, September-October 2011, 1476..... 13

I. INTRODUCTION

A single letter makes a big difference: “ship” and “shit.” Here, a letter makes a difference: “fuct” and “fuck.” Evidence that “shit” or “fuck” is vulgar is irrelevant to whether SHIP or FUCT is registerable.

FUCT was approved for publication after two office actions, neither of which raised Section 2(a). The statement of use with a specimen was accepted without reference to Section 2(a). Only after the application was approved for publication, did the Office first assert that the mark was immoral or scandalous. If it was not obvious to the examining attorney through two office actions and approval for publication, then the mark can hardly be scandalous to a majority of the public. It was not even scandalous to the experts.

This case probably is unique in the Board’s history: the mark has been in use for 22 years (23 as of the present time). So we have extremely probative evidence of what a substantial portion of the public actually thinks. In all those years, only one vulgarity complaint has been made. One person out of in 313 million (as of 2013) is not a “substantial portion of the public.” The brand is sold in leading streetwear retailers and in fact, is featured in stores on a premiere shopping district. This evidence trumps the, at best secondary evidence, of dictionaries.

However, the dictionary evidence confirms that FUCT is not vulgar. First of all, the only dictionary cited by the Office is the “Urban Dictionary is the dictionary you write. Define your world.” Under the TMEP the Office can rely on established dictionaries, which the Urban Dictionary is not. So there is no established dictionary supports the Office.

The evidence shows that FUCT is understood to be an arbitrary coined word. And even if the Urban Dictionary could be relied up, of the seven dictionary definitions for FUCT, six are not vulgar and two actually refer to the brand.

If there are more than one meaning, or if there is any doubt, then the mark should be approved for publication.

If the above is not sufficient, then the Board needs to address two additional issues.

As to the legal standard, the Office applied an incorrect test that is inconsistent with the plain language of the statute. The Office asserts that FUCT is vulgar. But, under the plain language of Section 2(a), in order to refuse registration, the mark must be scandalous, i.e., causing scandal. The case law expanding “scandalous” to include “vulgar” is wrong and should not be applied.

Then there is the constitutional issue. The commentators recognize the Section 2(a) is unconstitutional under the First Amendment. It is time for the Board to directly face this issue. Applicant asserts that it Section 2(a) is unconstitutional in part on its face and as applied. Since the unconstitutionality as applied does not call into question prior case law, the Board can find the Office’s refusal unconstitutional without facing larger issues. But if the Board has to reach the constitutionality of Section 2(a) as to this brand, it is urged to hold Section 2(a) unconstitutional.

II. PROCEDURAL HISTORY AND DESCRIPTION OF RECORD

The Application was filed on May 3, 2011. Office actions were issued on August 16 and December 22, 2011, neither raised Section 2(a). A statement of use was filed on May 22, 2012. The mark was approved for publication on June 12, 2012. Up to this time, no Section 2(a) refusal was made so the mark was not clearly scandalous.

On July 3, 2012, the mark was withdrawn from publication and an office action was issued. This office action asserted that the mark was “immoral and scandalous.” In this action, the Office cited a dictionary definition for FUCT that listed seven definitions, only one of which

could be vulgar. Importantly, two of the definitions recognized that FUCT is an abstract word that refers to a clothing brand.

Applicant responded to that office action on January 2, 2013, with evidence that FUCT is an arbitrary, coined mark. Applicant also submitted evidence that the public does not perceive FUCT as vulgar. Specifically, that in 22 years (now 23 years) of existence, the brand has received only one complaint. See, Brunetti Declaration. There are also third party users of FUCT for other goods and services that are not perceived as vulgar.

The Office issued a final refusal on January 27, 2013. It is difficult to tease out the actual conclusions from the boilerplate citations. In relevant part, the Office asserted “Therefore, the word FUCT is scandalous because it is disparaging and a total vulgar.” “In the instant case, the applicant’s indiscriminate vulgar use supports examiner’s assertion.” It appears that the Office only asserts that the mark is “scandalous” because it is allegedly “vulgar.” The distinction between “scandalous” and “vulgar” will be discussed at length below, although Applicant believes its mark is neither.

What is most surprising about the final refusal is that it does not respond to the evidence and arguments made the Applicant on January 2, 2013. Instead, the Office relied on the totally incorrect assumption that Applicant had conceded that FUCT is vulgar. The Office also cited numerous sources to prove that FUCK and SCREWED are vulgar, which of course, are not relevant to whether FUCT is scandalous. The Office also introduced many images of FUCT brand products and promotional materials, but did not explain the relevance of such images. In fact, those images confirm that the FUCT mark is not scandalous. At best, it shows that Applicant occasionally have photographs of a lady in a thong, but those few photographs less provocative than the famous CALVIN KLEIN billboards, and no one would assert that CALVIN

KLEIN is scandalous as a result.

Applicant requested reconsideration, submitting an affidavit of a retailer on a premiere shopping district who carries the brand. See, Gibbs Declaration. A supplemental declaration from Brunetti has further specimens of the brand and how the mark is used. On August 20, 2013, the examiner's response was "The term FUCT is the phonetic equivalent or past tense of FUCK. This is offensive."

Surprisingly, the Office never responded, in any of its actions, to the key arguments made by Applicant: FUCT is not the same as FUCK; the actual evidence of the lack of scandal or vulgarity over a 22 year period. Nor did the Office respond to the fact that the only dictionary cited by the Office actually supports a non-vulgar mention, or to the point that FUCT is an arbitrary coined mark. These failures are a concession that the Office's approval for publication was in fact, the correct decision.

III. ARGUMENT

A. Summary of Argument

In most of this brief, Applicant argues that FUCT is not vulgar. It appears that the Office has abandoned any contention that the mark is "scandalous" except insofar as the Office asserts that the mark is "vulgar." Therefore, in most of this brief discusses that the mark is not "vulgar," because that is the sole basis for the Office's contention that the mark is "scandalous" and therefore can be refused under Section 2(a). However, Applicant does contend that "vulgar" is not sufficient to be "scandalous" and if so, then Section 2(a) is unconstitutional as applied. But the Board need only reach such statutory and constitutional issues if does not accept the more factual arguments made initially.

B. FUCT Is Not “Fuck” or “Fucked.”

1. Only the Mark Applied for is Relevant

A letter makes a big difference. Although the Office cites much evidence that “fuck” is vulgar, that is irrelevant. One letter makes the difference between “luck” and “fuck,” between “ship” and “shit,” “ask” and “ass,” “fitch” as Abercrombie & Fitch sometimes uses on its products, and “bitch.” Closer to this case are “fact” and “fuct,” and “funk” and “fuck.” A clear example of this is the mark FCUK, which has been registered several times in the USA without any Section 2(a) refusal. F*CK is not vulgar since it is on the cover of a general circulation magazine. Ex. A. So the Board can and should disregard all the evidence about “fuck.” The question has to be is whether the mark applied for, FUCT, is scandalous.

2. The Office Has No Relevant Evidence that FUCT is Vulgar.

The Office has insufficient evidence to prove that FUCT is vulgar or scandalous. The only evidence is the UrbanDictionary.Com and some photographs of Applicant’s products. TMEP 1203.01, citing *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1136, 1341, states that “Dictionary definitions alone may be sufficient to show that a term is vulgar if multiple dictionaries, including at least one standard dictionary, uniformly indicate that the term’s meaning is vulgar, and the applicant’s use of the term is clearly limited to that vulgar meaning of the word.”

a. The Urban Dictionary is Insufficient Proof

This standard has not been met. In Boulevard, at least four dictionaries were cited, all edited by well-known dictionary publishers, who have staffs of professional lexicographers. The definition of the term was described as “usually vulgar.”

In this case, only one dictionary is cited, the Urban Dictionary. This dictionary is irrelevant (and as discussed below, inadmissible). First, unlike print dictionaries or other standard dictionaries cited in Boulevard or Mavety, the Urban Dictionary is not written and edited by professional lexicographers. Instead, as the banner on the website states “Urban Dictionary is the dictionary you write. Define your world.” (Emphasis in the original.) We know from the print-out of the Urban Dictionary cited by the Office that “fuct” was not defined by a professional lexicographer. It was written by a “Charles White” on January 27, 2003. He has only written five definitions.

Second, there is nothing in the Urban Dictionary that even suggests, let alone proves, that “fuct” is in common use at all (other than as Applicant’s brand name). A quick review of the dictionary (just as an example, the other definitions by Charles White), that many definitions are ones that virtually no one uses. So some uses are clearly rare and obscure. In a standard dictionary, rare and obscure uses are noted.

Third, unlike standard dictionaries mentioned in the above cases, the Urban Dictionary does not say that “fuct” is “usually vulgar.” In other words, that the first definition for “fuct” is the one understood by a substantial number of people. Virtually any word in the English language can be assigned a slang meaning by a small number of people. In fact, that is what the “author” of the first definition for “fuct” clearly does. His five definitions include “The Whole Ten Yards” and “Knob Goblin” and no one would think either are commonly understood to be vulgar, yet his definitions of these terms are. See the link on him.

Fourth, the Office assumed that the first definition of “fuct” was the most frequent or relevant. As is apparent from the print-out, definitions in the Urban Dictionary are organized by date, not by frequency of use. So if the dictionary were relevant at all, 85% of the usage is not

vulgar. At least 28% of the uses mean Applicant's brand.

Finally, the Urban Dictionary is a compendium of made up words and phrases. A rough guess is that about half of the definitions relate to sex. It is unlikely that even a fraction of the more than 7 million definitions (as claimed on the website) are definitions known by a material portion of the public. The first definition for "fuct" in the Urban Dictionary shows, it is merely usually obscure street slang. It is inconceivable that more than a small number of people would make such statements, and such persons would have no concern about decency. .

To be blunt, Urban Dictionary not evidence of anything and should be completely disregarded to the extent it is used to support the Office's contention that "fuct" is vulgar.

b. The Urban Dictionary is Inadmissible Hearsay

While dictionaries are usually admissible because they are based upon established principles for determining the extent of usage and meaning, by professional lexicographers. Simon Winchester's The Meaning of Everything: The Story of the Oxford English Dictionary (2003), is a wonderful description of how real dictionaries are created (and presumably most dictionaries). Look inside any established dictionary a distinguished board of editors of academics will be included.

The Urban Dictionary does not fall within any of the traditional hearsay exceptions. FRE 802 prohibits hearsay evidence unless it falls within an exception. No exception applies. FRE 803(18) refers to "published treatises . . . established as a reliable authority. . ." By its banner, the Urban Dictionary is explicit that it is not written by lexicographers.

So the Board should exclude the Urban Dictionary because it does not fall within any hearsay exception. The opinion of one "Charles White," about who we know nothing, is inadmissible hearsay.

c. Photographs of Applicant's Products Show That Use is Not Vulgar

Other than the Urban Dictionary, the Office only relies on photographs. The photographs of Applicant's products do not show use that is "vulgar." The mark FUCT is not used in a manner that suggests that its meaning actually is "fuck" or "fucked." Applicant's products are generally bland clothing. Occasionally, Applicant does make strong comments on society and politics, but those do not make FUCT vulgar.

A few other photographs show third party uses of FUCT but that do not establish a vulgar meaning. To the contrary, they show that "fuct" is used in non-vulgar senses.

In short, there is no admissible evidence to support the assertion that FUCT is vulgar. Nor is there any credible evidence that FUCT is vulgar.

3. There is No Evidence that a Material Portion of the Public Understands the Mark to be Vulgar

Even if the Board were to find some evidence supports the assertion that FUCT is vulgar, the record does not show that a material portion of the public understands FUCT to be "fuck" or "fucked" or any other vulgar meaning. Merely being a definition does not establish the fact that any material portion of the public understands that definition. Nor is there anything in the record that the Urban Dictionary lists definitions in the order of frequency of use; standard lexicographers may use that technique but if the Urban Dictionary is writing by the public.

C. FUCT is a Coined Term and Has No Meaning Other than a Brand Name

1. FUCT is an Arbitrary, Coined Mark

The evidence, Brunetti Decl., para. 4, is that FUCT is not a word, but an arbitrary coined mark, consisting of four letters. The Office submitted no evidence to refute this assertion.

As explained in the Brunetti Declaration, although the mark is an arbitrary, coined mark, his inspiration for selecting the mark is FRIENDS U CAN'T TRUST. Not a vulgar meaning.

2. FUCT is Understood By the Public to be a Brand Name, Not a Vulgar Word

The evidence in the record of how the public understands the FUCT mark is consistent that the public understands it to be a brand name, not a word, let alone the words “fuck” or “fucked.”

The Brunetti Declaration describes the 22 (now 23) year history of the FUCT brand. In the entire 22 year period, there has been only one single complaint about the name of the brand, and that was about 20 years ago. One person does not make a word vulgar. The Board cites no evidence of other complaints about the FUCT brand.

Further evidence confirms that the brand is not vulgar. The brand is in many parts of the country. It is sold on a high-end fashionable shopping district in Los Angeles: La Brea Avenue. The Board offered no evidence to dispute this. (And in fact, it is not a red-light district.) So if the brand is sold in a leading store on a fashionable shopping district, how can the brand name be vulgar with a material portion of the public? Likewise, the brand is sold on nationally prominent retail chain such as Urban Outfitters, numerous skateboard and street fashion shops and the major e-commerce retailer Karmaloop

The evidence which makes it indisputable that it is not vulgar is the fact that over 22 years, only one complaint was made. Brunetti Decl. 8. One person out of 313 million is so infinitesimal that so factually, that the American public does not view FUCT as vulgar. And unlike survey evidence or dictionaries, this shows what the American truly is concerned about, or more specifically, not concerned about.

Even the evidence offered by the Office confirms that the public understands FUCT to be a brand name. First, if the Board overrules Applicant's objection to the Urban Dictionary, then the Board has to consider that six of the seven definitions are not vulgar. Two of the definitions explicitly refer to Applicant's brand.

The Office also relies on images online from Google search for "fuct." All of the images are for Applicant's products or Applicant's promotional materials. None of the images show sexual intercourse ("fuck"), or post-sex conduct (i.e., "fucked"), for example naked people smoking a cigarette in bed. So that evidence supports Applicant's non-vulgar meaning.

D. The Office Used an Incorrect Standard in Refusing Registration; Vulgar is Not the Standard in Section 2(a).

Applicant believes that in Part B, it has shown that the Office has not meet its burden of showing that Office submitted no evidence that "fuct" is vulgar to a substantial portion of the public, or at all. In Part C, Applicant has established that the brand FUCT is not meant to vulgar, is not used in a vulgar matter, is sold in high-end retailers, and is not understood by the public to be vulgar. Either of those arguments resolves the matter, and the mark should be published for opposition. However, if the foregoing does not resolve this appeal, then there are two other issues that have to be addressed. In this part, it is shown that "vulgar" is not a correct standard; "scandalous" is the proper standard, and in no way is FUCT scandalous.

Although the Office's office actions are less than precise, it appears that the Office refused FUCT because it was "vulgar." Although mention is made of "immoral" and "scandalous," it appears that the Office concedes the mark is not "immoral." As to "scandalous," the Office seems to argue that the mark is "scandalous" only because the mark is, allegedly, "vulgar." "However, being "vulgar" is not grounds for refusal under Section 2(a). Over the

years, tribunals have added glosses to the statutory language of Section 2(a) and, in effect, added “vulgar” to Section 2(a) so that it reads “immoral, deceptive, scandalous or vulgar.” However, Applicant asks that the Board apply the rules of statutory construction required by the Supreme Court and apply the plain language of the statute. The plain language of the statute allows refusal only if the mark is likely to cause scandal, i.e., scandalous. “Vulgar” is not a statutory grounds for refusal.

The CCPA, in *In re McGinley*, 660 F.2d 481, 485 (CCPA 1981), the court cited a number of dictionary definitions from the 1940s:

“In affirming the Commissioner's refusal to permit registration of "MADONNA" for wines, this court, by reference to dictionary definitions, defined a "scandalous" use of a mark as use which would be "shocking to the sense of ... propriety," would "give offense to the conscience or moral feelings," or would "call out condemnation." *In re Riverbank Canning Co.*, supra, 95 F.2d at 328, note 7, 25 CCPA at 1029-30, 37 USPQ at 269.10 Webster's New International Dictionary (2d ed. 1942), defines "scandalous" as "Giving offense to the conscience or moral feelings; exciting reprobation, calling out condemnation.... Disgraceful to reputation...." Funk & Wagnalls New Standard Dictionary (1945) defines "scandalous" as "shocking to the sense of truth, decency, or propriety; disgraceful, offensive; disreputable, as scandalous conduct."

Nor was “vulgar” referenced in *In re Riverbank Canning*, 95 F.2d 327 at 327 (CCPA 1938)(the MADONNA wine case), the leading pre-Lanham Act case on this subject.

A fair reading of the 1940s definitions as well as Riverbank requires a standard higher than merely vulgar. “Calling out for condemnation” is much stronger than “vulgar.” A religious denomination that prohibits alcohol does not want Mary (Madonna) used in connection with wine. All of the 1940s definitions, are at least the majority refer to something more than just something in bad taste, i.e., “vulgar.”

The logical fallacy of the use of “vulgar” in connection with Section 2(a) is apparent. As used in the past, “scandalous” includes “vulgar”, so marks can be refused if “vulgar,” even if not “scandalous.” The correct reading is that a mark can be refused if “scandalous.” There is no need to discuss “vulgar” at all.

The point is relevant in this case, because FUCT is not scandalous. It is not shocking. It does not call out for condemnation. It would require tortured of misreading of a few subparts of the 1940s definitions of “scandalous,” ignoring the overall, plain meaning of “scandalous” to make FUCT into FUCK into something “shocking.”

The record is entirely devoid of anything showing that FUCT is shocking.

E. When There Are Multiple Meanings, a Mark Must Be Approved for Publication

When there are multiple meanings, and it is not clear that the prohibited one is dominant, the mark should be approved. In re Hepperle, 175 U.S.P.Q. 512 (T.T.A.B. 1972), (holding that although ACAPULO GOLD for sunblock could refer to marijuana, it could be viewed by consumers as referring to the city of Acapulco in Mexico.

F. In the Case of Doubt, a Mark Must Be Approved for Publication.

The Board and the Federal Circuit have made it clear that when there is doubt, a mark should be approved for publication. In re Over Our Heads, 16 U.S.P.Q.2d 1653, it stated: “Because the guidelines are somewhat vague and because the determination is so highly subjective, we are inclined to resolved doubts on the issue of whether a mark is scandalous or disparaging in favor of applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous or disparaging, an opposition proceeding can be brought a more complete record established. Likewise, in In re Friggin Barnyard, 1999 TTAB Lexis 108, the board noted “the difficulties in accurately discerning contemporary attitudes” and

noting the practice of passing the mark to publication to allow public opposition. The Federal Circuit has “commend[ed] the practice” of passing the mark to publication when there is doubt as to whether a mark is scandalous. In re Mavety Media Group Ltd., 33 F.3d 1367, 1374 (Fed. Cir. 1994).

While the Applicant believes the Section 2(a) refusal is plainly erroneous given the record, at minimum, the Board should order that the mark be approved for publication.

G. The First Amendment Prohibits the Office from Favoring Selected Speech.

If the Board still, after having considered the foregoing, believes that this mark should be refused, then the Board will have to address the constitutional issue of whether Section 2(a) violates the First Amendment. Several articles address this issue and generally conclude the Section 2(a) is unconstitutional or at least is of doubtful constitutionality. Examples are T. Davis, *Registration of Scandalous, Immoral, and Disparaging Matter Under Section 2(a) of the Lanham Act; Can One Man’s Vulgarity Be Another’s Registered Trademark*, Trademark Reporter, September-October 1993, 801; and L. LaLonde and J. Gilson, *Trademarks Laid Bare: Marks that May be Scandalous or Immoral*, Trademark Reporter, September-October 2011, 1476 at 1532 (“commentators have argued quite coherently that the court has gotten it wrong. The CCPA has been charged with ‘gloss[ing] over a difficult constitutional question’ and failing to provide a ‘slightly more erudite analysis’ due to the ‘delicate and subtle nature of free speech.’”) (quoting from further articles).

1. Restrictions on Speech are Presumptively Invalid.

“Congress shall make no law . . . or abridging the freedom of speech, . . . or the right of the people . . . to petition the government for a redress of grievances.” U.S. Constitution, First Amendment. The Office’s refusal to approve the mark for registration is a violation of this

fundamental principle. For the purpose of this section, it is assumed that FUCT contains a disagreeable meaning, otherwise, the Office would have no reason to refuse approval. But this refusal because of the meaning violates the First Amendment.

It is a bedrock principle underlying the scope of the First Amendment that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The government may not regulate speech based on its message it conveys, or favor one speaker over another. Discrimination against speech because of its content is presumed to be unconstitutional. Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). The government has no power to restrict expression because of its message or content.

The public has the right to hear every individual and every person has the right to speak them. American Communications Assoc. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

Even insulting and outrageous speech must be tolerated in order to provide adequate breathing space to the freedoms protected by the First Amendment. Snyder v. Phelps, 562 U.S. ___, 132 S.Ct. 1270, ___ L.Ed.2d ___ (2011).

There can be no dispute that Section 2(a) is presumptively invalid. The discussion in Kalman v. Cortes, 723 F. Supp. 766 (E.D. Pa. 2010), is so well-written that it can be quoted directly:

“[t]he Supreme Court has frequently declared that the very core of the First Amendment is that the government cannot regulate speech ‘because of its message, its ideas, its subject matter, or its content.’ ” *Startzell v. City of Philadelphia, Pa.*, 533 F.3d 183, 192 (3d Cir.2008) (quoting *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)); *see also Rosenberger*, 515 U.S. at 828, 115 S.Ct. 2510 (“It is axiomatic that the government may not regulate speech based on its substantive

content or the message it conveys.”). “If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating.” *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537-38, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (internal quotation marks and quotation omitted); *see also Startzell*, 533 F.3d at 192-93 (quoting same). “[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based,” *Startzell*, 533 F.3d at 193 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)), and as such “are ‘presumptively invalid,’ ” *id.* (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). Content- or viewpoint-based regulations are subject to the “most exacting scrutiny,” *id.* (quoting *Turner*, 512 U.S. at 642, 114 S.Ct. 2445), because they “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion,” *id.* (quoting *Turner*, 512 U.S. at 641, 114 S.Ct. 2445).”

The decision in Kalman is so similar that it is nearly on point. In Kalman, the State of Pennsylvania refused to register I Choose Hell Productions LLC as an entity name due to a state statute that barred corporate names containing “[w]ords that constitute blasphemy, profane, cursing or swearing or that profane the Lord’s name.” The court held the statute unconstitutional under the Freedom of Religion prong of the First Amendment, as well as under the Freedom of Speech prong. The latter is directly applicable here. If the refusal of “I Choose Hell Productions” is a violation of Freedom of Speech, then “Fuct” cannot be refused for the same reason.

That the First Amendment applies to Applicant’s mark is undisputable. The question to be discussed below, can the government show a compelling interest for its disfavor of Applicant’s speech. Or is there some other excuse of exception.

2. There is No Compelling Government Interest that Justifies the Restrictions on Speech.

The record reflects no compelling government interest in penalizing disfavored speech.

a. The Mark is Not Obscene.

The mark FUCT is not obscene.

b. The Argument That the Government is Merely Deciding How to Spend Money No Longer Has Validity.

It is clear that the Board is a governmental agency that is disfavoring some speech. So the Board has to establish a compelling governmental interest in regulating speech. In re McGinley, 660 F.2d 481 (CCPA 1981) held that the government was not favoring some speech, but only deciding what to spend its money on. This rationale was followed in In re Boulevard Entertainment, 334 F.3d 1336, 1343 (Fed. Cir. 2003). However, such rationale has completely disappeared now the PTO is self-supporting as to trademark examination; the fees are supposed to cover the costs of trademark examination and registration.

However, Applicant does not concede that this was ever a valid rationale. It is costing the Office far more to refuse this application than to allow it. The amount of money spent on any one application is minimal. In the case of this Application, the amount spent was minimal until the Section 2(a) refusal was made, and then the Office started spending money. Nothing in the refusal states it is because the government is spending money; to the contrary, the refusal is unmistakably clear that the real reason for the refusal is the Office's opinion that the mark is vulgar, not what money is being spent on.

c. The Argument that the Government is Not Preventing Speech is Wrong

It has also been argued that the government is not preventing speech, but merely granting

or refusing some benefits. This is mere sophistry.

The argument in McGinley and Boulevard that a person is not prohibited from using the mark, and therefore, there is no impermissible favoring of selected speech, is mere sophistry. Lacking a trademark registration, a person cannot register its mark with U.S. Customs and Border Protection, with the Trademark Clearinghouse (the clearinghouse of trademark claims for the new gTLDs), and cannot inexpensively register trademarks in other countries (because use of the Madrid Protocol is denied). Many non-governmental entities require a registration in order to take action against infringers, among them eBay.Com, DHGate.Com, even or cancel a hashtag on Twitter.com. So although someone can use a mark without federal registration, it is a right that is severely constrained.

When the lack of rights granted by the federal government that are available to owners of registered marks, the discrimination against speech is even clearer. No presumptions or incontestability. No statutory damages or broader right to recover attorney's fees in appropriate cases. No ability to register with Customs and Border Protection, or to exclude infringing goods under Section 42 (15 U.S.C. Section 1124). Without a federal registration, it is difficult to use the trademark as security because no recordal of a security interest with the Office is possible.

The assertion that the government, by denying a federal trademark registration, is not prohibiting conduct is untrue. The brand owner is denied many of the effective rights of trademark ownership. Without registration, one can have a common law trademark, but it will be impractical to enforce.

Now, if the government wants to take a very literal position that by denying a registration it is not prohibiting any conduct, the response is to be very literal in response. By denying a federal registration, the brand owner is prohibited from using the ® symbol.

So as a practical matter, denial of a federal registration makes the selection of an allegedly vulgar mark impractical. Applicant's business as suffered as a result.

If the foregoing were not clear enough, a few analogies will help. Could the Office constitutionally register METHODIST (for which there are 51 registrations) and refuse BUDDHIST? Could the Office allow DEMOCRATIC and refuse REPUBLICAN? What about DEVIL? Or devil worship such as WICCAN?

It is clear that grant of a federal registration is a favor. So the failure to grant it is disfavor of unpopular opinions. Whether to hold a parade on public property is a benefit that is granted or withheld. But no one would argue that the government could allow only parades held by the political party in office, or by one religious denomination to the exclusion of others. So the granting or withholding a benefit (such as federal registration) depending on the speech is impermissible governmental selection of speech.

3. Second 2(a)'s Standard is Too Vague to Survive Constitutional Scrutiny.

The Office's refusal of marks under Section 2(a) is arbitrary and capricious, and is not based upon any consistent standard.

a. Section 2(a) As Interpreted and Applied by the Office Does Not Provide Reasonable Notice of What is Allowable.

When regulating speech, the government must have a consistent standard. Section 2(a) as presently interpreted by the Office is not consistent or precise. As noted in *Lalond & Gilson, supra*, at 1533-34, there are standards that could meet constitutional standards for consistent application: "obscene" or "extremely offensive," for example. The public would have a better idea what is meant that "scandalous," and the especially vague "vulgar."

b. Section 2(a) Has Been Applied in an Arbitrary Manner.

The Office has been applying Section 2(a) in an arbitrary and consistent manner. Legal writers have commented on this. For example, in L. LaLonde and J. Gilson, *Trademarks Laid Bare: Marks that May be Scandalous or Immoral*, Trademark Reporter, September-October 2011, 1476 at 1478, the author noted that applications for MILF have been granted, and refused under Section 2(a), both in significant numbers.

Furthermore, it is clear that in connection with marks that include something similar to “fuck,” there is no consistent standard that applied by the Office. Marks allowed for registration including SNAFU (commonly known to be “situation normal all fucked up), PHUC, FAK, FCUK and DICTNo rational rule distinguishes marks allowed from FUCT which the office proposes to refuse. So, assuming that the mark applied for were FUCK (which definitely is not the case), there t” there is no rationale rule to distinguish the marks allowed and those refused. Rather, it is completely arbitrary. The defense that occasionally mistake are made in approving marks does not apply since the approval and refusal is so random as to be arbitrary.

The absence of consistent application of a precise standard that gives reasonable notice to the public of what is, or is not allowed, then the Office should be prohibited from applying its deficient standard that is being arbitrarily applied. And the evidence that the standard is arbitrary is that FUCT was approved for publication after two office actions, with nary a mention of Section 2(a).

4. Section 2(a) is an Unconstitutional Burden on Speech and Penalized

Disfavored Speech.

What is the compelling governmental interest in prohibiting the registration of marks such as FUCT? None. Does FUCT, with its philosophy of challenging the truthfulness of the

executive branch of the government has a right to compete in the marketplace, without a handicap vis-à-vis other brands? Definitely yes.

It is important to note that FUCT is not obscene. It does not disparage any religion or group.

So Section 2(a) if construed to prohibit the approval of FUCT is an unconstitutional burden on speech, making it difficult to have a brand called FUCT, and denies that brand the benefits granted to less controversial brands.

IV. CONCLUSION

Applicant respectfully submits that the examining attorney's correctly approved FUCT for publication, and the subsequent withdrawal of the mark was improper. Accordingly, Applicant requests the mark be approved for publication.

Dated this 15th day of January, 2014.

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F*CK CANCER

For photojournalist Andrew Youssef, life was music. Then came the disease
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Exhibit A